

1 JENNER & BLOCK LLP
2 Brent Caslin (Cal. Bar No. 198682)
3 bcaslin@jenner.com
4 Kenneth K. Lee (Cal. Bar No. 264296)
5 klee@jenner.com
6 633 West 5th Street, Suite 3500
7 Los Angeles, California 90071
8 Telephone: (213) 239-5100
9 Facsimile: (213) 239-5199

10 JENNER & BLOCK LLP
11 Dean N. Panos (admitted *pro hac vice*)
12 dpanos@jenner.com
13 Richard P. Steinken (admitted *pro hac vice*)
14 rsteinken@jenner.com
15 353 N. Clark Street
16 Chicago, IL 60654-3456
17 Telephone: (312) 222-9350
18 Facsimile: (312) 527-0484

19 Attorneys for Defendants
20 Kellogg Company, Kellogg USA, Inc., Kellogg Sales Co.

21 UNITED STATES DISTRICT COURT
22 CENTRAL DISTRICT OF CALIFORNIA

23 MICHELLE WEEKS and MARIA
24 SANDOVAL, individually and on behalf
25 of all others similarly situated,

26 Plaintiff,
27 v.

28 KELLOGG COMPANY, a Delaware
corporation; KELLOGG USA, INC., a
Michigan corporation; KELLOGG
SALES COMPANY, a Delaware
corporation, and DOES 1 through 100,
inclusive,

Defendants.

} No. CV 09-08102 (MMM) (RZx)

**KELLOGG'S REPLY IN SUPPORT
OF MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: August 29, 2011
Hearing Time: 10:00 a.m.
Courtroom: 780
Judge: Hon. Margaret M. Morrow

Defendants Kellogg Company, Kellogg USA, Inc. and Kellogg Sales Company (collectively “Kellogg”), by and through their attorneys, Jenner & Block LLP, hereby submit their Reply in Support of the Motion for Final Approval of Class Action Settlement.

INTRODUCTION

After months of intense negotiations, the exchange of substantial discovery, the depositions of two named plaintiffs and three Kellogg representatives, and mediation involving former California Supreme Court Justice Edward A. Panelli, now of JAMS San Francisco, Kellogg and Class Counsel entered into the settlement set forth in the Stipulation of Settlement (Dkt. 121) which this Court preliminarily approved by Order dated May 9, 2011. Dkt. 126. Under the terms of that settlement, a non-revertible settlement fund of \$2.5 million was established and funded ten days after the Court preliminarily approved the settlement, from which Class Members may recover \$5 per box for up to three boxes of Rice Krispies and Cocoa Krispies cereals, up to a total of \$15. To obtain the cash payment, Class Members need only submit a simple claim form with their name, address and number of boxes purchased, without the need to submit proof of purchase. After payment of the Class distributions, any Court-ordered Fee and Expense Award to Class Counsel, and the class representative incentive awards to named Plaintiffs, money remaining in the settlement fund will be paid, upon approval by the Court, in equal shares to the Food Safety, Health, and Nutrition Project of Public Justice, the Westside Food Bank, and the food safety program at the University of Georgia.

In addition, subject to Court approval pursuant to the *cy pres* doctrine, over the next year, Kellogg will also distribute Kellogg-branded cereals and other food products having a value of \$2.5 million to charities that feed the indigent: the Westside Food Bank and Feeding America. Kellogg agreed to assume costs of transportation and other charges otherwise incurred by these charities for the receipt of this food, as well as all costs of Class Notice and claims administration. Kellogg also

1 agreed to institute changes to its advertising and marketing of Rice Krispies and
 2 Cocoa Krispies cereals.

3 Between this Court's preliminary approval of this settlement on May 9, 2011
 4 and the objection/opt out deadline of July 30, 2011, Class Members had the
 5 opportunity to review the terms of the Stipulation of Settlement and joint motion for
 6 preliminary approval filed on January 10, 2011, and Plaintiffs' motion for final
 7 approval and application for attorneys' fees and expenses filed on July 18, 2011. The
 8 result has been more than 78,000 submitted claim forms, three opt outs from the
 9 Class, and two lone objections raising misguided and factually-incorrect arguments
 10 that attempt to minimize the substantial benefits Kellogg will bestow on the Class
 11 through this settlement. Given the real benefits provided to the Class by the
 12 settlement and the apparently overwhelming support for the settlement among Class
 13 Members, this Court should overrule the objections of both Nicholas John Stehle and
 14 Shaun J. Mathers, and grant final approval to the Settlement reached by the parties.

15 **ARGUMENT**

16 The ultimate question to be determined in considering a request to approve a
 17 proposed class action settlement is whether the settlement is "fundamentally fair,
 18 adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir.
 19 2003); *see also* Fed. R. Civ. P. 23(e)(2). Here, the positive response of the Class
 20 Members reflects their collective assessment that the compromise settlement reached
 21 in this case is fair and reasonable to all parties, and that the nature of the relief is more
 22 than adequate given the nature of the claims. The Court's preliminary assessment of
 23 the settlement terms reached a similar conclusion. The Court noted that the proposed
 24 settlement "terms appear sufficient and fair, reasonable and adequate to warrant
 25 dissemination of notice" with "no obvious deficiencies" and were reached "in good
 26 faith, following arms-length negotiations" between counsel. Dkt. 126 at 3-4. Nothing
 27 raised in the two objections filed in this case justifies any different conclusion.

1 The Objections filed by both Shaun Mathers and Nicholas John Stehle raise
2 concerns about Kellogg's food donations and the two charitable organizations that
3 will be the recipients of those donations: Westside Food Bank and Feeding America.
4 Mathers complains that Westside Food Bank is a localized charitable organization that
5 cannot distribute food to the entire settlement class, complains that the donation to
6 Feeding America may simply supplant other Kellogg donations, and criticizes the fact
7 that both Westside Food Bank and Feeding America have existing relationships with
8 parties or their counsel. Stehle contends that the designation of the local Westside
9 Food Bank will result in overcompensation of class members in Los Angeles County,
10 argues that the parties have failed to demonstrate a lack of conflict of interest with the
11 *cy pres* recipients, suggests that the settlement permits the donation of junk food and
12 poorly-selling brands, and criticizes the amount and valuation of the food donation.
13 However, the criticisms provide no basis for withholding final approval of the class
14 action settlement that this Court has already preliminarily approved.

15 The complaint that Westside Food Bank is a localized charitable organization
16 so that class members in Los Angeles County will be overcompensated is premised on
17 the baseless assumption that the food donation will be equally apportioned between
18 Westside Food Bank and Feeding America. In fact, the Stipulation of Settlement
19 (Dkt. 121 at 22-23) makes no attempt to allocate the food donation between the two
20 recipients but instead expressly states that the distribution of food to the charities will
21 be done subject to Court approval. Logic dictates that the parties, with Court guidance
22 and approval, will allocate the bulk of the donated food to the national food bank
23 making donations on a national level.

24 The complaint that a conflict of interest may exist because Kellogg is listed as a
25 "Leadership Partner" on the Feeding America website is entirely specious. The
26 website defines Leadership Partners as those entities who since July 1, 2005 "have
27 made significant philanthropic investments, including aggregate contributions or

1 commitments of \$10 million or more, donations of 100 million pounds or more of
2 food and grocery product to Feeding America, or combined gifts of funds, food and
3 grocery product at this level” and identifies among the Leadership Partners some of
4 the leading American food companies, including ConAgra Foods, General Mills,
5 Kellogg Company, Kraft Foods, Kroger and PepsiCo. Kellogg’s commitment to
6 philanthropic donations to Feeding America and its status as a Leadership Partner are
7 matters of long-standing, and will continue wholly apart from the settlement here.
8 While the designation of Feeding America as a *cy pres* beneficiary here does mean
9 that the food bank will receive well over another million dollars in food donations
10 from Kellogg, the notion that the designation is somehow detrimental to the class or
11 improperly beneficial to Kellogg is baseless.

12 Equally baseless is the concern expressed by Mathers that the donation here
13 might simply supplant donations that were already going to be made by Kellogg to
14 Feeding America. This food donation was an intensely negotiated term of the
15 settlement relief and was recognized by the parties as an important vehicle by which
16 to provide value to the Class and the public at large in a case where individual Class
17 Members cannot realistically be identified. The donation will be in addition to other
18 charitable donations that Kellogg has made and will make in 2011 and 2012. Any
19 suggestion that Kellogg’s charitable donation through the settlement here would have
20 been made anyway is simply wrong.

21 Both Mathers and Stehle complain that the value of the *cy pres* food donation is
22 inflated because the donated food is listed at retail value. In fact, although the
23 Stipulation of Settlement states that the donated food products will have a total retail
24 value of \$2.5 million, the donation here will be valued in the same manner as the food
25 donation in the Frosted Mini-Wheats case, *Dennis v Kellogg Company*, No. 09-01786-
26 IEG (WMC) (S.D. Cal.), where the donation was valued at Kellogg’s sales prices to
27 its customers, not the retail price at which Kellogg’s customers sell these products to
28

1 consumers. Using this valuation rather than retail value, the amount of food that will
 2 be donated to the Westside Food Bank and Feeding America will be considerably
 3 more than the 500,000 boxes of cereal that Mathers speculates about without support.

4 Mathers also criticizes as too low the reported value of the *cy pres* donation
 5 based on his comparison to other settlements, but his analysis is flawed. Mathers
 6 states that Kellogg settled claims with the Oregon Attorney General by donating
 7 480,000 boxes of cereal which had a wholesale value of \$1.15 million, or \$2.40 per
 8 box, and that if the Oregon settlement as he described it was provided on a nationwide
 9 basis its value would exceed \$40 million. In fact, Exhibit E to Mathers' Objections
 10 explains that in the Oregon settlement, Kellogg donated 108,000 boxes of cereal with
 11 a wholesale value of \$332,000 to the Oregon Food Bank and another 372,000 boxes
 12 with a wholesale value of \$1.15 million to Feeding America. Thus, Mathers'
 13 valuation of a nationwide settlement based on the Oregon settlement is overstated by
 14 at least two-thirds. Moreover, Mathers ignores the fact that the actual Oregon
 15 settlement also provided food donations on a nationwide basis, undermining his
 16 attempt to extrapolate using the numbers from that settlement.

17 Mathers also claims that the settlement here pales in comparison to what he
 18 describes as Kellogg's \$12 million settlement of claims arising from the marketing of
 19 Frosted Mini-Wheats. However, the Mini-Wheats settlement in fact included a
 20 settlement fund of \$2.75 million and a food donation of \$5.5 million. Moreover,
 21 Mathers' attempt to compare the relative settlements of the two pieces of litigation
 22 based purely on the final settlement figures ignores the very different issues and
 23 litigation history of the two cases and is overly simplistic.

24 Finally, Stehle complains that the value of the settlement is inflated because
 25 Kellogg will be able to donate what he describes as junk food like Keebler Rainbow
 26 Chips Deluxe Cookies or Kellogg's Pop-Tarts Ice Cream Shoppe Hot Fudge Sundae
 27 toaster pastries. Kellogg's millions of dollars in food donations over the years

routinely include food items from all of its numerous product lines and the same guidelines and procedures that facilitated those past donations will be employed in making the donations under this settlement. Stehle offers no support for his characterization of certain Kellogg products as junk food nor does he offer proof that the Kellogg products he identifies would be any less valued or enjoyed by consumer recipients than other products. In his attempt to defeat the parties' negotiated settlement, his baseless attack on Kellogg food products is unavailing.

CONCLUSION

For all the foregoing reasons, this Court should reject the Objections filed by Shaun Mathers and Nicholas John Stehle and grant Final Approval of the Class Action Settlement reached by the parties to this litigation.

/s/ Kenneth K. Lee

Kenneth K. Lee

JENNER & BLOCK LLP

Brent Caslin (Cal. Bar No. 198682)
bcaslin@jenner.com
Kenneth K. Lee (Cal. Bar No. 264296)
klee@jenner.com
633 West 5th Street, Suite 3500
Los Angeles, California 90071
Telephone: (213) 239-5100
Facsimile: (213) 239-5199

Dean N. Panos (admitted *pro hac vice*)
dpanos@jenner.com
Richard P. Steinken (admitted *pro hac vice*)
rsteinken@jenner.com
353 N. Clark Street
Chicago, IL 60654-3456
Telephone: (312) 222-9350
Facsimile: (312) 527-0484

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, I served Kellogg's Reply in Support of Motion for Final Approval of Class Action Settlement to the following via U.S. Mail:

Howard Weil Rubinstein
howardr@pdq.net
Howard W. Rubinstein Law Office
914 Waters Avenue Suite 20
PO Box 4839
Aspen, CO 81611

George Azadian
george@cttmesq.com
THE MATHEWS LAW GROUP
2596 Mission Street, Suite 204
San Marino, CA 91108

Joe R. Whatley, Jr
jwhatley@wdklaw.com
Whatley Drake Kallas
1540 Broadway 37th Floor
New York, NY 10036

Daniel Greenberg
DnGrnbrg@gmail.com
GREENBERG LEGAL SERVICES
55 Fontenay Circle
Little Rock, AR 72223
501-588-4245

Sara D. Avila
savila@maklawyers.com
Milstein Adelman LLP
2800 Donald Douglas Loop North
Santa Monica, CA 90405

Shaun J. Mathers
shaunjm@hotmail.com
10 Mountain Oaks Park
La Crescenta, CA 91214

Counsel for Michelle Weeks

Behram V. Parekh
bvp@kirtlandpackard.com
Heather Marie Peterson
hmp@kirtlandpackard.com
Kirtland and Packard
2361 Rosecrans Avenue 4th Floor
El Segundo, CA 90245

Counsel for Maria Sandoval

/s/ Kenneth K. Lee

Kenneth K. Lee